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104TH CONGRESS, *1st Session* | SENATE | REPORT 104–172

HOUSING FOR OLDER PERSONS ACT OF 1995

NOVEMBER 9, 1995.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany H.R. 660]

The Committee on the Judiciary, to which was referred the bill (H.R. 660) to amend the Fair Housing Act to modify the exemption from certain familial status discrimination prohibitions granted to housing for older persons, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Housing for Older Persons Act of 1995".

SEC. 2. DEFINITION OF HOUSING FOR OLDER PERSONS.

Section 807(b)(2)(C) of the Fair Housing Act (42 U.S.C. 3607(b)(2)(C)) is amended to read as follows:

"(C) intended and operated for occupancy by persons 55 years of age or older, and—

"(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

"(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

"(iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall—

"(I) provide for verification by reliable surveys and affidavits; and

"(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.".

SEC. 3. GOOD FAITH ATTEMPT AT COMPLIANCE; DEFENSE AGAINST CIVIL MONEY DAMAGES.

Section 807(b) of the Fair Housing Act (42 U.S.C. 3607(b)) is amended by adding at the end the following new paragraph:

"(5)(A) A person shall not be held personally liable for monetary damages for a violation of this title if such person reasonably relied, in good faith, on the application of the exemption under this subsection relating to housing for older persons.

"(B) For the purposes of this paragraph, a person may only show good faith reliance on the application of the exemption by showing that—

"(i) such person has no actual knowledge that the facility or community is not, or will not be, eligible for such exemption; and

"(ii) the facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption."

I. PURPOSE

The purpose of H.R. 660 is to eliminate the burden of the "significant facilities and services" requirement in the seniors housing exemption of the Fair Housing Act. This legislation is needed to provide a clear, bright-line standard of when a seniors housing community is in fact "housing for older persons" for purposes of the Fair Housing Act. H.R. 660 is intended to clear up this problem and return to the original intent of the Fair Housing Act exemption Congress created for seniors housing in 1988. H.R. 660 is designed to make it easier for a housing community of older persons to determine whether they qualify for the fair Housing Act exemption.

II. LEGISLATIVE HISTORY

The Civil Rights Act of 1968 was passed to prohibit discrimination on the basis of race. Title VIII of the act was called the Fair Housing Act. It prohibited discrimination on the basis of "race, color, religion, or national origin" for any sale of housing, rental of housing, financing of housing, or provision of brokerage services.

The housing practices for which discrimination is prohibited include the following:

Sale or rental of dwelling;

Provision of services or facilities in connection with sale or rental of a dwelling;

Steering any person to or away from a dwelling;

Misrepresenting availability of dwelling;

Discriminatory advertisements; and,

Charging different fees or providing different benefits.

In 1974, the Fair Housing Act was amended to prohibit discrimination on the basis of sex. In 1988, the Fair Housing Act was

amended again, and changes thereto included a prohibition against discrimination on the basis of handicap and on the basis of "familial status," which means living with children under the age of 18. At the same time Congress extended the Fair Housing Act to prohibit discrimination against families with children, it added (at 42 U.S.C. 3607(b)) an exemption for three categories of housing for older persons. Such housing included State and Federal programs specifically designed and operated to assist elderly persons (42 U.S.C. 3606(b)(2)(A)) and housing intended for, and solely occupied by, persons 62 years of age or older. Id. at 3607(b)(2)(B).

The third category of exemption was for housing "intended or operated for occupancy by at least one person 55 years of age or older per unit." The Secretary of HUD was directed to develop regulations for determining whether housing qualified for the exemption, including as one of the factors "the existence of significant facilities and services specifically designed to met the physical or social needs of older persons. * * *" Id. at 3607(b)(2)(C)(i).

Interpreting and implementing the "significant facilities and services" standard has been very troublesome. For the last 7 years, it has been unclear what the phrase "significant facilities and services" means. The Department of Housing and Urban Development (HUD) regulations have not been sufficiently clear or helpful. There have been so many lawsuits that the exemption Congress intended is now being revoked as a practical matter by threat of litigation.

In 1992, Congress set out to solve the problem with "significant facilities and services" by passing the Housing and Community Development Act of 1992 which required HUD to issue a revised rule defining the phrase "significant facilities and services." Two years later, in 1994, HUD finally issued proposed rules to define the phrase. A few months later, in response to overwhelming disapproval, HUD withdrew the proposed regulations.

In 1995, the House of Representatives passed H.R. 660, the Housing for Older Persons Act of 1995, by a margin of 424 to 5.

III. Section-by-Section Analysis

Section 1

This section sets forth the short title for the legislation, the "Housing for Older Persons Act of 1995."

Section 2

This section amends subparagraph (C) of section 807(b)(2) of the Fair Housing Act (42 U.S.C. 3607(b)(2)). This section deletes the "significant facilities and services" requirement for housing for older persons. The major inquiry that H.R. 660 requires in order to determine whether a facility or community qualifies for housing for older persons is whether, in fact, the community is comprised of eligible individuals. The housing provider can demonstrate its intent to providing housing for persons 55 years or older, even if it allows persons under age 55 to continue to occupy dwelling units or move into the housing facility and occupy dwelling units, as long as the housing facility maintains the 80-percent occupancy threshold.

Subsection (C) retains the exemption for housing that is ''intended and operated for occupancy by persons 55 years of age or older,'' but does not require a showing of the existence of ''significant facilities and services.'' Subsection (C)(i) creates a bright-line test that 80 percent of the occupied units must be occupied by at least one person 55 years of age or older. Subsection (C)(ii) requires the housing facility or community to publish and adhere to ''policies and procedures'' demonstrating the intent to provide housing for occupancy of at least 80 percent of the occupied units by at least one person 55 years of age or older per unit. This subsection specifically states that such policies and procedures need not be set forth in the governing documents of such facility or community.

Subsection (C)(iii) requires the housing facility or community to comply with rules made by the Secretary of HUD for the verification of occupancy. The rules issued by the Secretary must allow for verification by reliable surveys and affidavits and ''shall include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii).'' In addition, this section specifically allows such surveys and affidavits to be admissible in administrative and judicial proceedings for the purposes of such verification.

Section 3

This section creates a defense against the imposition of money damages for compliance where a person has relied in good faith on the application of the exemption relating to housing for older persons. A person who wishes to establish the good-faith reliance under this subsection has to make a showing of no actual knowledge that the facility or community is not eligible for the exemption and the facility or community has certified to such person, in writing, that it complies with the requirements for such exemption. Such a writing need not be notarized or otherwise witnessed, but it must contain indicia of authenticity, such as being on stationary with the letterhead of the facility or its operator and signed by an individual identified as a responsible officer, employee, agent, of the facility or its operator.

This section allows an individual to raise a defense which will prevent the imposition of money damages where he or she relies, in good faith, on the existence of an exemption for ''housing for older persons'' and it is later found that the exemption did not apply. This section will preclude an award of money damages, but does not shield a person from injunctive relief.

This exemption is necessary because the housing for older persons exemption contemplates a fact-intensive showing that the community meets the age and occupancy requirements. It is not practical to expect someone who inherited a home or other housing unit from their parents to conduct this inquiry. Similarly, real estate agents should not have to perform a census of a housing community every time they list a home or other housing unit. Nevertheless, if, after inquiring of the community manager, a person seeking this good-faith reliance has ''actual knowledge'' that the facility or community is not eligible for the exemption, the good-faith exemption does not apply.

IV. DISCUSSION

H.R. 660 removes the troublesome "significant facilities and services" requirement from the definition of "Housing for Older Persons" and replaces it with a simple four-part test. The "significant facilities and services" requirement has been a disaster since the housing for older persons exemption was passed as an exception to the general rule prohibiting discrimination against families with children in 1988. Nobody, including the Government, can figure out what the phrase "significant facilities and services" means. Further, the requirement discriminates against low-income senior citizens. As a result, seniors housing, particularly low-income seniors housing, is faced with the uncertainty and unfairness of a confusing Government policy, the threat of litigation and the resulting limitation on the availability of affordable housing for older persons.

In 1992, Congress recognized this problem and passed a law instructing HUD to reissue the regulations for "significant facilities and services." Even with direction from Congress, HUD failed to establish what the phrase "significant facilities and services" means and the regulations were withdrawn in response to widespread disapproval. New regulations are now available, but they will not solve the problem either. There will be inherent ambiguity in enforcing any regulation under this exemption. Requiring "significant facilities and services" operates to discriminate against lower-income seniors. They cannot afford the lavish services contemplated by HUD and others.

As Mr. Bill Williams, president of the Federation of Mobile Home Owners of Florida, Inc., stated in his testimony before the subcommittee, "this issue is not about discrimination against families." We all oppose that. But Congress recognized in 1988, and we recognize in 1995, that seniors should be allowed to live in safe, quiet communities congenial to them. Most importantly, they should be able to do so regardless of their income. As Mr. Williams said, the problem is "finding adequate affordable housing for all seniors." As long as "significant facilities and services" is a part of the law, only well-to-do seniors will be able to enjoy safe seniors communities.

According to Mr. Williams, HUD had received 20,000 complaints by October 1992. Of the 20,000 complaints, 17,0000 were closed that year resulting in over $7 million in penalties. Mr. Jensen, the CEO of Jensen's Residential Communities, stated in his testimony that "[if] a complaint were to be filed, I would have to decide whether or not to conciliate or to go to court to defend my exemption. Both are costly options." To make matters worse, according to Mr. Jensen, "[t]here is no definitive source for me to go to as a businessperson to determine my compliance. * * * I cannot find guidelines to comply with the facilities and services requirements."

H.R. 660 clears up these problems and establishes a bright-line rule for housing for older persons. This is more fair to both older persons and families with children since it makes the law understandable.

H.R. 660 has three sections: section 1 is the title; section 2 removes the significant facilities and services test and replaces it

with the simple, fact-based definition of housing for older persons; section 3 includes a good-faith reliance provision.

The new definition of Housing for Older Persons is a four-part test: (a) intended and operated for older persons, (b) of the occupied units, 80 percent are actually occupied by at least one person 55 years of age or older, (c) the community has policies and procedures that demonstrate the intent, (d) the community complies with HUD rules.

In addition, the bill provides a good-faith defense if (1) there is no actual knowledge that the community is not eligible as housing for older persons, and (2) the facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption.

This is a confused area of law that demands a legislative solution. Low-income seniors deserve the same protection as wealthy seniors. The original act is intended to allow this exemption, but litigation, confusion, and poorly drafted regulations have discouraged or outright denied seniors housing. H.R. 660 had bipartisan support in the house and in the subcommittee and it has been changed to reflect bipartisan discussions. We need to preserve housing for older persons. This bill offers that protection by creating a bright-line test for housing for older persons without provoking litigation.

V. SUBCOMMITTEE ACTION

The Senate Subcommittee on Constitution, Federalism, and Property Rights of the Committee on the Judiciary held a hearing on H.R. 660 and the issue of housing for older persons. The hearing was held on Tuesday, August 1, 1995, at 9 a.m. Testimony was taken from Senator Jon Kyl; Stuart Ishimaru, counsel to the Assistant Attorney General on Civil Rights; Bill Williams, president of the Federation of Mobile Home Owners of Florida; Kristian Jensen, CEO of Jensen's Residential Communities; James Morales, staff attorney, National Center for Youth Law; and Lori Van Arsdale, council member, city of Hemet, California.

The Senate Subcommittee on Constitution, Federalism, and Property Rights of the Committee on the Judiciary, with a quorum present, met on Wednesday, August 2, 1995, at 10 a.m., to mark up H.R. 660. Senators Brown, Hatch, Kyl, DeWine, and Simon were present.

One amendment was offered by Senator Simon and adopted by voice vote. The amendment clarified the requirement that at least 80 percent of the occupied units in a senior citizens' community are occupied by at least one person 55 years of age or older. This reflects the intent of H.R. 660 as introduced. H.R. 660 as introduced referred to ''intended and operated'' for the occupancy of at least 80 percent by older persons. This reference to ''intended'' suggested that the 80-percent requirement might be interpreted to be less than 80 percent. To remove that ambiguity, language suggested by Senator Simon was adopted to make the 80-percent occupancy of occupied units a bright-line standard.

Senator Simon also offered, then withdrew, an amendment which would have stricken the good-faith defense section.

The subcommittee then passed H.R. 660, as amended, by voice vote. All Senators present voted in favor of the measure.

VI. COMMITTEE ACTION

The Senate Committee on the Judiciary, with a quorum present, met on Thursday, October 26, 1995, at 9 a.m., to mark up H.R. 660, as reported by the Subcommittee on Constitution, Federalism, and Property Rights.

Senator Hatch brought up for consideration H.R. 660 as it passed the House.

Senator Kyl, on behalf of himself and Senator Brown, offered a substitute amendment. The substitute amendment included the change to section 2 that was agreed to in subcommittee as well as a change to section 3. The change to section 2, which was agreed to in subcommittee, clarified that 80 percent of the occupied units must be occupied by at least one person 55 years of age or older. The change to section 3 narrowed the good-faith reliance section. As amended, a person may only show good-faith reliance under this section by meeting the standard set out in section 3(B). That is, the person must show no actual knowledge and that the community has stated, in writing, that the community complies with the exemption for housing for older persons. The substitute amendment was accepted by unanimous consent.

The Committee on the Judiciary then passed H.R. 660, as amended by the substitute amendment, by unanimous consent.

VII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that House Resolution 660 will not have direct regulatory impact.

VIII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 2, 1995.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 660, the Housing for Older Persons Act of 1995, as ordered reported by the Senate Committee on the Judiciary on October 26, 1995. CBO estimates that enacting H.R. 660 would result in no significant cost to the federal government or to state and local governments. Because enacting H.R. 660 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to this legislation.

Under the Fair Housing Act, it is unlawful to discriminate based on family status in the sale or rental of a dwelling. However, current law affords an exemption for "housing for older persons" (age-restricted communities), generally defined as housing that includes significant facilities and services specifically designed to meet the physical or social needs of older persons. H.R. 660 would define this

exemption to apply to housing where at least 80 percent of the units are occupied by at least one person 55 years of age or older. In addition, the act would exempt persons who acted in good faith from liability for monetary damages in suits stemming from the seniors-only provision.

The intent of H.R. 660 is to clarify the meaning of "housing for older persons." This issue has been a source of housing discrimination lawsuits for a number of years, involving both the Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD). It is possible that the legislation could lead to a reduction in the number of these lawsuits and thus lower the caseload of DOJ and HUD. Based on information from these agencies, however, we do not expect that enacting H.R. 660 would have a significant effect on the costs incurred by DOJ or HUD.

On March 27, 1995, CBO provided a cost estimate for H.R. 660 as ordered reported by the House Committee on the Judiciary on March 22, 1995. This version of the bill is nearly identical to the House version, and CBO's estimate of costs is unchanged from the previous estimate.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

JUNE E. O'NEILL, *Director*.

IX. ADDITIONAL VIEWS OF SENATOR KYL

H.R. 660 will eliminate many of the problems that senior communities have experienced over the last decade. The Fair Housing Act of 1988 was designed to protect families with children from discrimination in housing. H.R. 660 repeals HUD's "significant facilities" requirement, which is the primary test senior communities have to meet to qualify for an exemption from the 1988 anti-discrimination statute. Only developments designed to house the elderly as evaluated and approved by the Department of Housing and Urban Development (HUD) are exempt from that statute.

Many of my constituents argue that the federally imposed definition of "significant facilities" and services increases the cost of their housing and tells them how to live. They say that some senior housing complexes are being hit with unfair discrimination lawsuits because of confusion about which housing qualifies for the exemption from the anti-family discrimination statute.

David S. Schless, executive director of the American Seniors Housing Association, stated that HUD's rules for significant facilities and services would "have a devastating effect on keeping a community's costs down, particularly in the mobile home communities."

Apart from the larger question of whether the government should be in the business of regulating individuals freedom of association in the first place, surely this government can get along quite well without imposing what the investigative scholar James Bovard calls "federal bingo mandates for senior citizens."

Only developments designed to house the elderly are exempt from the anti-discrimination statute. Although the statute was well-intended, it has made the lives of seniors unnecessarily difficult. Fewer regulations and restrictions would allow senior communities to operate more efficiently and freely. Is it too much to ask that the seniors of our country be allowed to live without intrusion from the federal government?

Most senior citizens I know are independent and highly capable. They don't want to pay extra to have someone read to them. They don't want or need to be told by the federal government how to live.

Not only has it been difficult to comply with the regulations, it has been impossible for senior communities to regain their exemption once it is lifted. According to an April, 1995 article in the Orlando Sentinel, "lawyers could not find a single instance in which a senior community was able to defend successfully against a challenge to its exempt status * * * [t]his was not supposed to be an impossible test but to sort out the facilities that were really for older persons from those that merely wanted to exclude children."

Some argue that with the reining in of the federal government's control, health and safety regulations could be compromised. There

is, I believe, a consensus that some of the government's regulatory burden—estimated to cost the U.S. economy more than a half-trillion dollars a year—ought to be prudently and carefully retracted where possible. We tried to accomplish that goal with regulatory reform. A good place to renew these efforts would be HUD's published regulations for senior citizen housing. Even Clinton administration officials have changed their position, relaxing the interpretation to allow plenty of room for communities to meet the facilities and services standards.

Some put forward the objection that this bill discriminates against families. H.R. 660 does not discriminate against any party. It does not change how families are treated under the Fair Housing Act. The exemption already exists for senior communities. H.R. 660 eliminates the regulatory ambiguity and makes it easier to determine which communities qualify for the anti-discrimination exemption.

If the argument is about discrimination, then HUD's regulations are a perfect example of discrimination—against seniors. These regulations increase the price of rent in senior facilities and, therefore, effectively discriminate against low-income seniors. It's hard to explain the federal government's aggressive prosecution of the owners of senior citizen mobile home parks for alleged violations of the Fair Housing Act. Surely, we have better things to do than criminalizing trivial senior housing violations. But that is precisely how HUD has applied the Fair Housing Act. It's difficult to make a case that senior housing is such a national problem.

HUD's latest argument is that H.R. 660 is unnecessary due to HUD's recent revision of its rule regarding significant facilities and services. This is not true. Susan Brenton and the 25,000 members of Arizona Association Manufactured Home Owners say that the new rule "is still very nebulous and leaves a lot of areas open to court decisions (and each court case costs the residents of a community thousands of dollars)."

The new HUD regulations state that communities that provide at least two services each from five of 12 categories—all defined by HUD—qualify for the exemption. The HUD-approved services include: bingo clubs, bowling trips, tai-chi classes, seminars on how to get more government benefits, and pet therapy for residents' animals. Some improvement.

To be sure, wealthier senior communities can probably live with these new regulations. But the lower-income communities will have a difficult time adding any extra cost. Why should anyone be forced to play bingo, and pay for it? I would like to insert into the record a letter Chairman Hatch received from AARP outlining the urgent need to pass H.R. 660, the Housing for Older Persons Act of 1995.

Even the wealthier senior communities will be affected in the long run. Many development companies have expressed reluctance to build senior communities because they believe the regulations hinder demand for these communities.

The House of Representatives passed the bill by an overwhelming vote of 424 to 5 earlier this year. The Senate should do the same.

AMERICAN ASSOCIATION OF RETIRED PERSONS,
Washington, DC, October 23, 1995.

Hon. ORRIN HATCH,
Chairman, Committee on the Judiciary,
Senate Dirksen Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I am writing on behalf of the American Association of Retired Persons (AARP) to express our continuing support for the Housing for Older Persons Act of 1995 (H.R. 660) and to urge its immediate consideration and passage.

AARP believes that age-specific housing should be preserved as an important service to many older persons. Congress recognized at the time the Fair Housing Amendments Act was passed that the standards established to meet the statute's exemption for housing for older persons would have to be clear, workable, and flexible enough to be applicable to the wide array of housing, residents, and abilities to pay in the elderly housing market. Unfortunately, promulgating and enforcing clear and workable standards has proven to be nearly impossible. Efforts to clarify the statute's requirement of ''significant facilities and services'' have been undertaken in three rulemakings under two Administrations.

While AARP applauds HUD's most recently issued rule—a significant improvement over its proposed rule of July 1994—the Association has come to the conclusion that the complex and seemingly contradictory statutory provisions defining housing for older persons have made equitable enforcement very difficult, if not impossible. Our Legal Counsel for the Elderly office was unable to find any successful defense of a claim of exemption for housing for older persons among cases receiving judicial review. When coupled with significant anecdotal evidence of rather arbitrary decisions by fair housing investigators, the conclusion is inescapable that implementation of the law has not been consistent with the flexibility intended by Congress. Indeed, widespread dissatisfaction with the statute's enforcement threatens the very viability of the important new protections provided in the Act.

AARP appreciates the leadership of your Committee and the work of Senators Gorton and Kyl in addressing this issue. If we can be of any further assistance, please do not hesitate to have your staff contact Don Redfoot of our Federal Affairs staff at 434–3800.

Sincerely,

MARTIN CORRY,
Director, Federal Affairs.

JON KYL.

X. ADDITIONAL VIEWS OF SENATORS SIMON, KENNEDY, AND FEINGOLD

In 1988, Congress included familial status as a protected class under the Fair Housing Act because of evidence that housing discrimination against families was pervasive and often affected minority families disproportionately. According to the legislative history of the 1988 Act, the housing for older persons exemption was included in the Act to accommodate some seniors's desire to live in retirement communities. Two kinds of exemptions were created: first, a bright line, age-based exemption for retirement communities in which all residents are 62 years of age or older; and second, a conditional exemption for retirement communities that provide significant facilities and services designed to meet the physical and social needs of older residents.

This bill amends the Fair Housing Act to expand the ability of seniors communities to exclude families with children. It does this, in part, by eliminating the requirement that communities seeking the older persons housing exemption must provide "significant facilities services" for the elderly and creating a good faith defense for defendants in lawsuits challenging the exclusion of families with children.

We agreed to these changes to the 1988 Act because many in the seniors community, particularly those with lower incomes, who expressed concerns that the interpretation of the significant facilities and services requirements unduly burdened their ability to create and live in legitimate retirement communities. Nonetheless, we must express our reservations about the possible unintended effects of these changes.

SIGNIFICANT FACILITIES AND SERVICES

Section 919 of the Housing and Community Development Act of 1992 required the Secretary of the Department of Housing and Urban Development (HUD) to issue rules defining the scope of "significant facilities and services designed to meet the physical or social needs of older persons." Congress called for these regulations in order to provide much-needed clarity to determinations of whether a facility qualifies for this exemption. On July 7, 1994, HUD issued its first proposed rule to implement section 919. After commentators expressed concern that the rule did not provide the needed clarity, HUD withdrew it. On March 14, 1995, HUD issued a second proposed rule which addressed the legitimate concerns and criticisms raised about the first proposed rule. HUD reports that the vast majority of commentators praised the March 14 proposed rule and urged its adoption without additional changes. In the background discussion of the final rule as published in the Federal Register, HUD notes that sixty-one percent of the total com-

ments received on the March 14 proposed rule consisted of a form letter which read is part:

> I support the newly proposed rule on Significant Facilities and Services for Housing for Older Persons under the Fair Housing Act. I believe the needs of seniors in senor housing are fairly reflected and supported in the flexibility of the new amendments. The new regulations are simple, clear and realistic. I appreciate HUD staff's willingness to travel across the country and listen compassionately to testimony. Thank you for responding positively to the valid concerns of seniors and community leaders expressed in the hearings.

On August 18, 1995, during the pendency of H.R. 660 before this committee, HUD issued its final regulations interpreting the significant facilities and services provisions. The final rule, effective September 18, 1995, includes few changes from the March 14 proposed rule. The final rule creates a broad checklist of potential facilities and services a seniors community may provide in order to qualify for the exemption and allows communities to self-certify that they qualify for the exemption. We believe that the regulation could finally provide the clarity and certainty that has been absent in the interpretation and enforcement of the significant facilities provision.

We note with concern that the elimination of the significant facilities and services provisions of the 1988 Act subverts the justification for allowing certain seniors communities to discriminate against families with children. That is, that the exception is necessary in order to facilitate senior's ability to live in environments that are, in the words of the House Judiciary Committee report on the 1988 Act discussing the need for the exception, "tailored to their specific needs." In other words, the requirement was intended to ensure that housing communities claiming this exemption were indeed legitimate retirement communities designed to meet the specific needs of senior citizens not just communities of seniors united by their preference to not live around children. By eliminating such a requirement, this bill may have the unintended effect of increasing discrimination against families with children.

As a result, we believe oversight of the effects of this bill, if enacted, is critical. We have not agreed to this change to our nation's civil rights laws to merely accommodate the desire of some seniors to live only amongst older persons if the price is the promotion of discrimination and the decrease of decent, affordable housing for families with children. We agreed to the changes so that legitimate retirement communities, whether rich or poor, could qualify for the exemption. If there is evidence that the effect of this legislation is to rebuild the environment that led to the inclusion of familial status in the coverage of the Fair Housing Act in the first place, we believe that reinstatement of the significant facilities and services requirements will be warranted.

GOOD FAITH EXCEPTION

The good faith defense established by this bill would shield individuals accused of familial status housing discrimination from per-

sonal liability for monetary damages if they reasonably relied, in good faith, on a belief that the housing community was a seniors community permitted to discriminate against families with children. As with the other provisions of this bill, we believe that oversight of the effects of the codification of this defense is critical to ensure that it does not have the unintended effect of allowing willful lawbreakers to escape the payment of monetary damages as otherwise authorized under the law. Toward that end, we believe that the defense should be available only to those who can show both that he or she did not know that the facility did not qualify for an exemption and that he or she actually relied on a formal statement, in writing as described in this committee report. We believe that establishing such a reliance must include a showing that the individual, at a minimum, actually saw the facility's formal statement of compliance.

PAUL SIMON.
EDWARD M. KENNEDY.
RUSSELL D. FEINGOLD.

XI. MINORITY VIEWS OF SENATOR BIDEN

The bill is a retreat from a commitment we made to families with children.[1]

In 1988, Congress extended the protections of the Fair Housing Act to cover familial status. In the face of widespread evidence of discrimination against families, and a countrywide proliferation of "all adult" housing, we said—94 to 3—that enough was enough. America's housing providers shouldn't be able to arbitrarily hang a "No Kids Allowed" sign on their doors.

At the same time that we passed the new law, we also carved out an exception for legitimate retirement communities which catered to the special needs and requirements of the elderly. The distinction that we made then—and which I stand by now—is this: you can't just keep kids away because you don't like them, or because you don't want them around. If you're going to exclude children, you must be an organized community providing "significant facilities and services" designed to meet the physical and social needs of the elderly.

This requirement for significant facilities and services was included to distinguish senior lifestyle communities from run-in-the-mill housing complexes. We recognized that something—something other than an animus against children—must set these communities apart in order to merit an exemption from the Fair Housing Act.

I understand that what constitutes "significant facilities and services" has been a matter of much controversy and uncertainty over the years. And I also understand that the Department of Housing and Urban Development has made several different attempts to craft a definition—which has led to confusion, and has made it difficult for those trying to comply with the law.

But none of that, in my view, should lead us to abandon the basic principle: if you're going to be able to discriminate against families, you should be special—and you should be serving the special needs of seniors.

This principle should remain our guidepost now more than ever—especially since HUD has just recently promulgated completely revised regulations which resolve the confusion and make it much easier and clearer for senior housing communities to take advantage of the exemption. HUD, many now agree, has gotten it right.

Under the new regulations, which went into effect on September 18 of this year, a housing facility can "self-certify" that it falls under the Fair Housing Act exemption—by simply filling out a straight forward, easy-to-understand checklist of facilities and serv-

[1] I regret that I was unable to attend the committee's markup of the legislation on October 26, 1995. I therefore was not part of the quorum which reported the bill out of committee.

ices designed for older folks. This checklist contains a "menu" of some 114 facilities and services in eleven categories; if a facility provides 10 among them—like wheelchair accessibility, communal recreational facilities, periodic vision or hearing tests, or fellowship meetings—it qualifies as senior housing, and may exclude families. If the facility's status is challenged, it need only show that the certification was accurate at the time of the alleged violation.

The list of facilities and services included in the new rule was drawn from amenities actually provided by a wide cross section of senior housing developments across the country—large and small, affluent and less well-off, manufactured housing communities, condominiums, and single family communities. (Written testimony of Sara K. Pratt, Director of the Office of Investigations, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, before the Subcommittee on the Constitution, Federalism, and Property Rights, August 1, 1995 at 4.).

Ms. Pratt also testified to the extreme flexibility—and cost-consciousness—built into the new guidelines:

> [The rule] does not assume that people living in housing for older persons are frail, disabled or require nursing home care. It does not require congregate dining or on-site medical care. * * * The facilities and services may be provided on or off the premises of the housing. They may be provided by staff, volunteers (including residents and neighbors), or by third parties, such as civic groups or existing organizations in the community. *Id.*

The new regulations do not require lavish services, as the majority would have us believe; nor do they mandate facilities affordable only by the well-heeled. Rather, they simply embody what's already being offered in bona fide senior communities—of all sorts—across the map. And if a facility is providing at least 10 of the 114 facilities or services on the list, it qualifies for the exemption.

Proponents of H.R. 660 say that it will make it easier, and surer, for a housing community to determine whether it qualifies for the Fair Housing Act exemption. I ask: what could be easier than a one-page checklist? What could be surer than self-certification? This, in my view, is a bare bones set of requirements for getting out from under the anti-discrimination provisions of the Act.

The "bright line" standard for which H.R. 660 trades away the "significant facilities and services" requirement is this: at least one 55-year-old must live in 80 percent of the units. Let's look at what that really means. Say, for example, that a complex contains 100 units, all of which are occupied by two people, and 80 percent of which are occupied by someone over 55. In this hypothetical community—which will be able to lawfully discriminate against families under H.R. 660—as few as 80 residents of the 200 could be 55 or over, while 120 could be under 55. *More than half* the residents of this community—which need not provide a single special amenity—can be under 55 to qualify for the exemption, and legally keep families out.

To my mind, the math just doesn't add up to fairness for families and children. I believe this bill will give a green light to the very

kind of "all adult" housing facilities that we in 1988 sought to proscribe. I cannot support it.

JOE BIDEN.

XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the changes in existing law made by the bill, as reported by the committee, are shown as follows (existing law proposed to be omitted is enclosed in bold brackets, new matter is printed in italic, and existing law with no changes is printed in roman):

SECTION 807 OF THE FAIR HOUSING ACT

EXEMPTION

SEC. 807. (a) * * *

(b)(1) Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title regarding familial status apply with respect to housing for older persons.

(2) As used in this section, ''housing for older persons'' means housing—

(A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or,

(B) intended for, and solely occupied by, persons 62 years of age or older; or

[(C) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:

[(i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and

[(ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

[(iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.**]**

(C) intended and operated for occupancy by persons 55 years of age or older, and—

(i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

(ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and

(iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall—

(I) provide for verification by reliable surveys and affidavits; and

(II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

* * * * * * *

(5)(A) A person shall not be held personally liable for monetary damages for a violation of this title if such person reasonably relied, in good faith, on the application of the exemption under this subsection relating to housing for older persons.

(B) For the purposes of this paragraph, a person may only show good faith reliance on the application of the exemption by showing that—

(i) such person has no actual knowledge that the facility or community is not, or will not be, eligible for such exemption; and

(ii) the facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption.

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